

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

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IN RE:

**PETITION OF TENNESSEE AMERICAN
WATER COMPANY TO CHANGE AND
INCREASE CERTAIN RATES AND
CHARGES SO AS TO PERMIT IT TO
EARN A FAIR AND ADEQUATE RATE
OF RETURN ON ITS PROPERTY USED
AND USEFUL IN FURNISHING WATER
SERVICE TO ITS CUSTOMERS**

DOCKET No. 04-00288

CONSUMER ADVOCATE'S MOTION TO COMPEL

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to Rule 37.01(2) of the Tennessee Rules of Civil Procedure, Tennessee Regulatory Authority Rule 1220-1-2-.11(9), and the Hearing Officer's Scheduling Order as amended December 15, 2004, and hereby respectfully moves to compel Tennessee American Water Company ("TAWC") to fully and completely answer and respond to the discovery request(s) that are the subject of this Motion.

I. INTRODUCTION

In accordance with the procedural schedule established by the Hearing Officer, the Consumer Advocate filed its discovery requests and served them on TAWC on November 15, 2004. On December 2, 2004, TAWC filed, and served same on the Consumer Advocate, the response(s) which are the subject of this motion.

In its responses, TAWC raised objections to the Consumer Advocate's discovery

requests.¹ The Consumer Advocate has previously sought to work through these discovery disputes informally, but was unable to do so.

II. STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt “to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (*quoting* Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. *See Id.* Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear

¹ The objections of TAWC were filed on December 2, 2004, outside the time period described in the Hearing Officer’s Order of August 26, 2004.

on any of the case's issues." *Id.* Discovery therefore is not limited to the issues raised by the pleadings. *See Id.*, *see also Shipley v. Tennessee Farmers Mutual Ins. Co* , 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may also use discovery to: define and clarify the issues; probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. *See Shipley*, 1991 WL 77540 at *7-8 (*quoting Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, however, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *See Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.* Moreover, given the liberal construction of discovery rules, the trial court should approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. *See Id.* Rather than denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information.

See Id.

III. THE TRA SHOULD COMPEL TAWC TO RESPOND TO THE CONSUMER ADVOCATE'S DISCOVERY REQUESTS

In this docket TAWC submits to the TRA a request to increase rates based on the idea that the requested increase are just and reasonable. It falls upon the TRA to determine if the rate increase should be approved. In an effort to obtain information that is necessary for the TRA to fulfill its responsibilities, the Consumer Advocate fashioned its discovery requests to obtain information regarding TAWC's proposal. The Consumer Advocate's discovery requests were calculated to define and clarify the issues, probe the factual basis of the proposals, and formulate issues which the Consumer Advocate believes should be considered in review of the proposed amendments. Accordingly, the Consumer Advocate's requests are calculated to lead to the discovery of admissible evidence in the TRA's review of TAWC's proposals in this docket.

For these reasons set forth herein, the Consumer Advocate respectfully requests the TRA to enter an order compelling TAWC to respond to the Consumer Advocate's discovery request No. 43. The request and response at issue are set out below:

DISCOVERY REQUEST NO. 43:

Provide copies of any correspondence, notes, e-mails, reports or other documents from RWE or RWE Thames Water to American Water or Tennessee American where RWE or RWE Thames informs American Water or Tennessee American that RWE Thames must achieve an overall return on capital of 8 percent annually.

TAWC's Response to Request No. 43:

Petitioner objects to this request on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Petitioner stated that the return on capital employed target set for the RWE Thames Water division of the company is 8%. Capital employed includes equity capital as well as external capital. For the

RWE Thames Water division, of which American Water is a part, this would include capital employed in both regulated and unregulated enterprises.

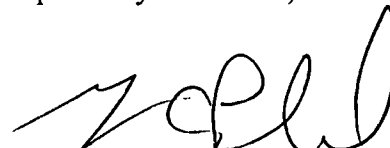
TAWC objects to **Request No. 43** and does not provide the subject items. The objection lodged by TAWC is inconsistent with the goal of open discovery discussed previously herein.

Moreover, the objection itself does not fit the request. The request is not overly broad, nor unduly burdensome. The request does have great potential for leading to admissible evidence. More specifically, to the extent TAWC intends to contradict Dr. Brown's observation that the 8% return sought in this matter is by TAWC is the result of an arbitrary directive from the parent companies of TAWC then the information is pertinent. The spectrum of the request is clearly defined and is therefore not overly broad. It may be that no such documents and things exist. However, the existence of the documents and things at issue is best answered by TAWC which likely has exclusive control these documents.

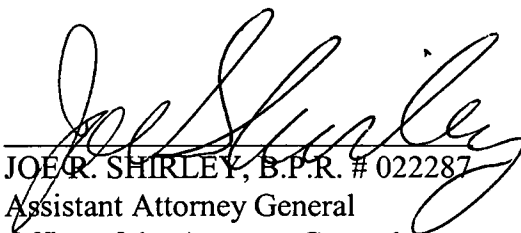
IV. CONCLUSION

The foregoing considered, the Consumer Advocate respectfully moves for an order compelling TAWC to supplement its discovery responses.

Respectfully submitted,



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Dated: January 12, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served via the methods indicated on January 12, 2005, to the following:

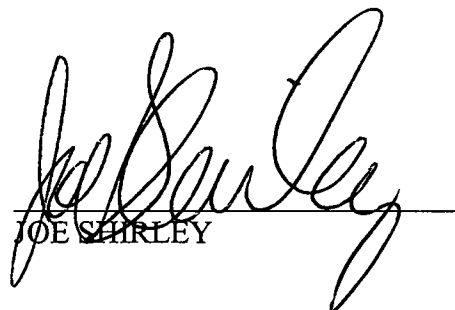
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